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Agency

# Legal System Abuse

The increased activity and actions  
businesses can take to mitigate fallout



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# The costs of legal system exploitation

Legal system abuse, a term describing tactics designed to increase the size and frequency of liability settlements and court verdicts, has an impact far beyond the courthouse. This trend is forcing U.S. businesses and communities to pay a steep price, in the form of legal expenses, higher insurance costs, reputational damage, reduced productivity, and even loss of jobs.

**This report explores the risks arising from legal system abuse and offers insights on how businesses can mitigate them.**

What is legal system abuse and what is driving it? To understand this legal trend, it is useful to consider its alias, social inflation. That is not a new phenomenon for policyholders and their liability insurers; social inflation has been observed for decades. In Berkshire Hathaway Inc. Chairman Warren Buffett's [1977 letter](#) to shareholders, his discussion of rising liability insurance costs cited "social inflation," a broadening definition by society and juries of what is covered by insurance policies." The [Insurance Information Institute \(III\)](#) applies a somewhat broader scope to this legal trend, defining "legal system abuse as policyholder or plaintiff attorney practices that increase costs and time to settle insurance claims." The III notes legal system abuse can happen when plaintiffs litigate disputed claims that could have been resolved without court intervention.

**This trend and litigation funding are contributing to greater expenses for businesses, consumers, and communities. There are multiple drivers of legal system abuse, and studies suggest three are leading contributors to increasing legal costs:**



### **01. Attorney advertising**

Billboards, radio, television, and online [advertisements](#) by plaintiffs' attorneys are ubiquitous. A 2022 study by the [American Tort Reform Association](#) (ATRA) found that plaintiffs' attorneys spent \$6.8 billion to generate more than 77 million national and local advertisements between 2017 and 2021. In 2023, attorneys spent \$72 million on advertising in [New York City alone](#) and \$97 million on ads across New York State. This barrage of plaintiff attorney messaging—ranging from “You may be entitled to compensation” to “Make the right call” to “No fee unless we win” to purported guarantees of larger settlements—may have a persuasive effect on public perceptions. ATRA suggests plaintiffs' attorneys' aggressive pursuit of clients is a significant factor in the frequency of litigation.

Even though some states have legislation governing attorney advertising, such as requiring disclaimer language, plaintiffs' attorneys often do not correct ads to reflect court actions reducing or overturning initial [big verdicts](#). For example, unless a law requires such correction, a billboard showing a \$5 million trial verdict in a personal injury case arising from a trucking accident might mislead passersby who are unaware that the award was reduced by 80% on appeal.



## **Billboards. Radio. Television. Online.**

**Plaintiffs' attorneys' aggressive pursuit of clients is a significant factor in the frequency of litigation.**

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# **\$6.8B**

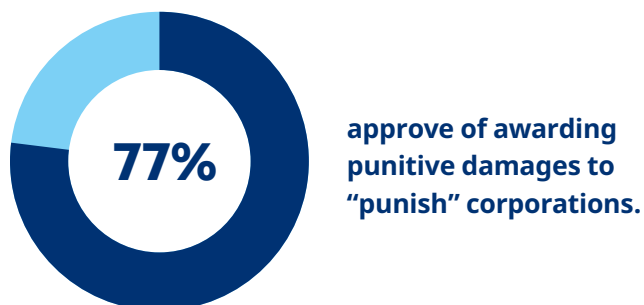
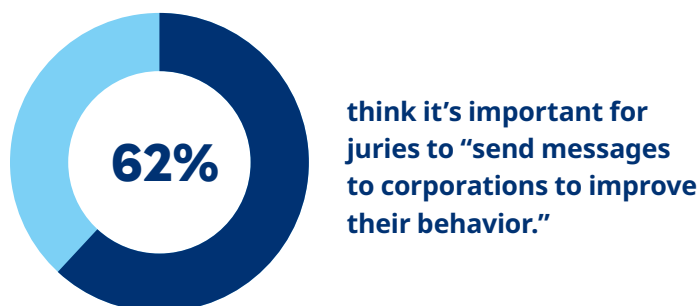
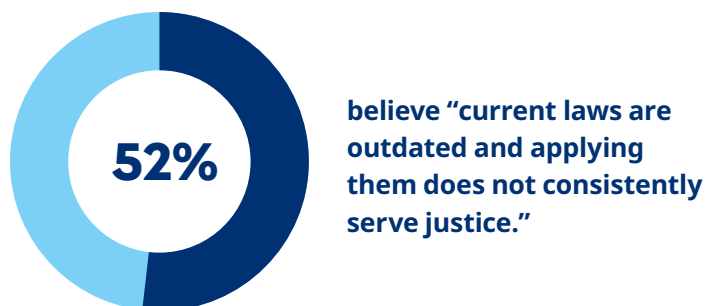
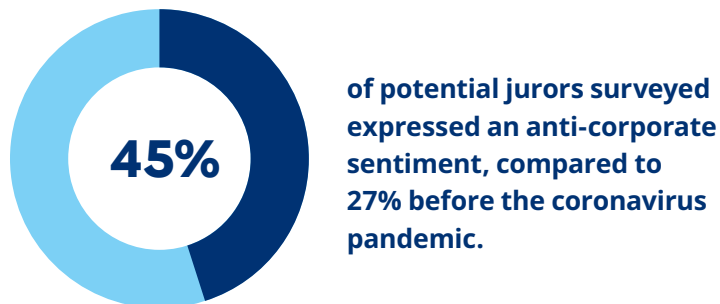
**was spent to generate more than 77 million national and local advertisements between 2017 and 2021.**

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## 02. Public attitudes toward lawsuits

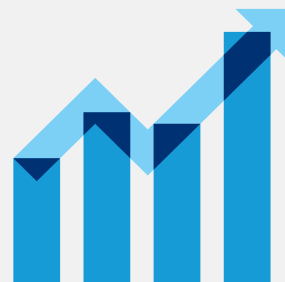
An Orrick, Herrington & Sutcliffe LLP survey of more than 1,000 potential jurors across the U.S. found [many jurors are increasingly distrustful of institutions](#) and may be willing to “take the law into their own hands.” Among the defense law firm’s findings:



The [RAND Institute](#) notes in a 2024 study on trends in trial awards and insurance claim payments: Insurers and others have argued that legal system abuse

**“creates a feedback loop in which rising levels of tort compensation fuel expectations of financial windfalls among potential claimants and the attorneys who represent them, which, in turn, stimulates the filing of new claims and associated lawsuits.”**

In other words, attorney advertising may contribute to a “lottery” mentality for potential plaintiffs. As outsize verdicts become more common, in effect raising the perceived ceiling on liability, the floor for settlement negotiations could also rise.





### 03. Third-party litigation funding

Third-party litigation funding, or TPLF, refers to investors with no relation to the underlying lawsuit. TPLF provides funds to enable plaintiffs to bring suit, for which investors receive a portion of an eventual judgment or settlement.

Litigation funding is a field with

**39** | **\$15.2B**  
active funders | assets under management

Litigation funding is a field with 39 active funders and \$15.2 billion in assets under management, according to a 2023 report by [Westfleet Advisors](#), which tracks litigation finance. The average deal size for litigation funders in 2023 was \$7.8 million, Westfleet found. More than one-third of litigation funding commitments involved single matters, while two-thirds were allocated to portfolios of legal cases. This ratio has been consistent since 2019, according to the report.

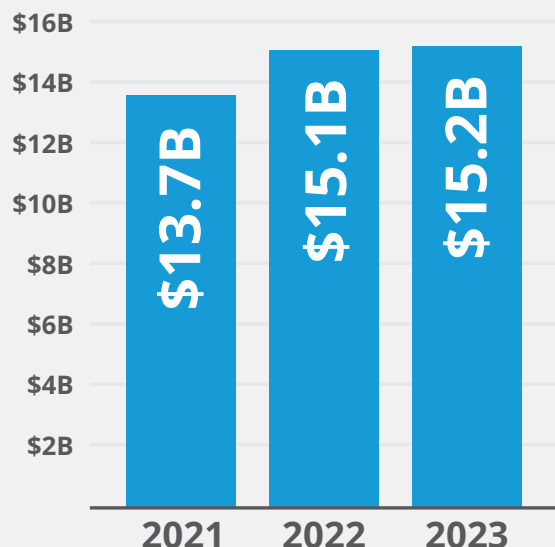


**The longer-term trend continues to be toward larger average transaction size across all types of deals, however.**

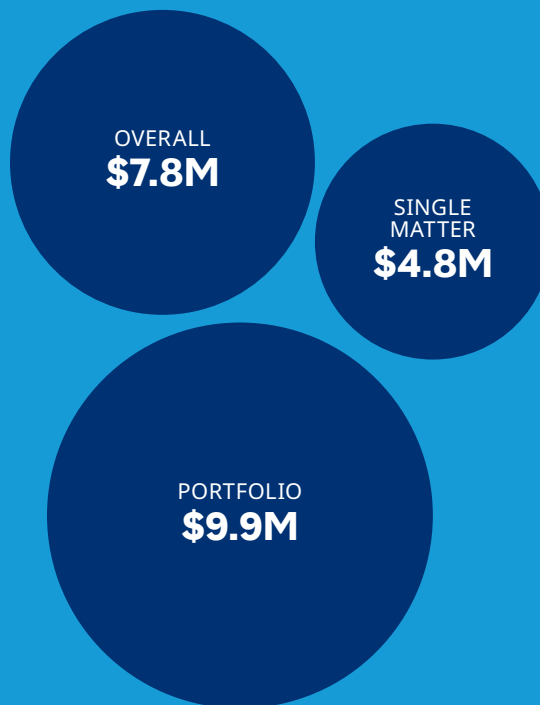
- The Westfleet Insider

While most people have seen or heard plaintiffs' attorneys advertising, far fewer may be aware of third-party litigation funding. A survey conducted by Munich Re and the American Property Casualty Insurers Association (APCIA) found that [public awareness of legal system abuse](#) is mixed. For example, 89% of respondents to the Munich Re/APCIA survey reported seeing attorney advertising, only 41% said they were aware of TPLF. This survey finding signals a bigger problem with TPLF—a lack of transparency.

### Growth of Industry Assets Under Management\*



### 2023 Avg Deal Size









Concerns about funded patent litigation and the need to protect intellectual property were raised in a hearing earlier in 2024 by the U.S. House Judiciary Committee's Subcommittee on Courts, Intellectual Property and the Internet.

According to Westfleet, patent litigation accounts for 19% of funded lawsuits. Additionally, sponsors of legislation highlight national security concerns, noting that foreign entities may fund lawsuits to gain access to sensitive information during the discovery process. To address these challenges, specialized [IP insurance](#) is available to protect intellectual property and cover costs related to patent enforcement.

### The ripple effect

A study by the U.S Chamber of Commerce's Institute for Legal Reform (ILR) estimated U.S. tort costs levy a direct "[tort tax](#)" of more than \$3,600 on each household, and that amount is growing by a rate that exceeds economic inflation. The ILR figure does not reflect the indirect costs associated with increasing tort expenses, which include lost productivity and reputational damage for defendant companies, and loss of jobs for communities.

As the RAND Institute put it, "The potential consequences of expanded liability can themselves act as drivers of social inflation. For example, large jury awards in tort trials could have the secondary effect of increasing settlement values for similar tort claims that may never reach the litigation stage."

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## 'Reptile theory' effective on jurors

A long-deployed tactic by plaintiffs' attorneys at trial, known as the "[reptile theory](#)," may be effective in swaying jurors' opinions. The theory, proposed in 1990 by neuroscientists, posits that human brains have a primitive structure that responds to perceived threats, fears, and dangers. Trial attorneys adapted this theory in courtroom arguments to persuade jurors to view defendants as presenting threats to society. **In essence, reptile theory attempts to trigger emotional responses from a jury. The idea is to encourage jurors to take action to address the perceived threat, namely punishing defendants and awarding damages to plaintiffs.** Emotional connections are important to jurors, according to a recent survey of potential jurors by Orrick, Herrington & Sutcliffe LLP. When Orrick asked if "making an emotional connection to the subject matter and the people involved in the trial would be important" for jurors to reach a fully informed decision, 62% said yes. Only 38% disagreed. "Reptile theory" courtroom tactics may very likely continue until defense attorneys find effective ways to refocus juries on the underlying facts of a case.





## The impact outside the courthouse

**The impact of legal system abuse on businesses and communities extends well beyond the courthouse steps. Litigation frequency and a growing number of “nuclear verdicts” are costing businesses.**



If a large judgment ultimately does not result in a business shutting its doors, it could force the business to make other difficult choices. Those choices may involve shelving expansion plans, cost-cutting that includes layoffs, and even withdrawal from certain legal jurisdictions. Those, in turn, could exacerbate economic challenges for employees and their families, and communities the business serves. In addition, costly litigation may result in other risks and exposures for the business such as additional lawsuits, reputational damage, and loss of customers. For these reasons, it makes sense to work with a risk advisor that has specialized knowledge and tools to assist organizations in managing their risks.

A troubling sign amid the legal system abuse trend is the evolution of terms to describe the size of verdicts. Decades ago, a verdict exceeding \$5 million would have been considered large. Today, “[nuclear verdicts](#)” of \$10 million or more have become commonplace, “mega nuclear verdicts” over \$100 million are growing, and there is a new, even higher category: “[thermonuclear verdicts](#),” or those exceeding \$1 billion. Even though these massive awards constitute a small fraction of lawsuits, they serve to inflate plaintiffs’ expectations.

In a decade-long study of more than 1,300 nuclear verdicts involving personal injury or wrongful death, the [Institute for Legal Reform](#) (ILR) found 101 verdicts exceeding \$100 million. Of these verdicts, 85% were between \$100 million and \$500 million, about 6% were between \$500 million and \$1 billion, and nearly 9% of the verdicts surpassed \$1 billion. Notably, most of these verdicts involved compensatory damages, not punitive damages. The ILR found non-economic damages, such as awards for pain and suffering, constitute the majority of nuclear verdict amounts.

# \$10M+

is considered a nuclear verdict.

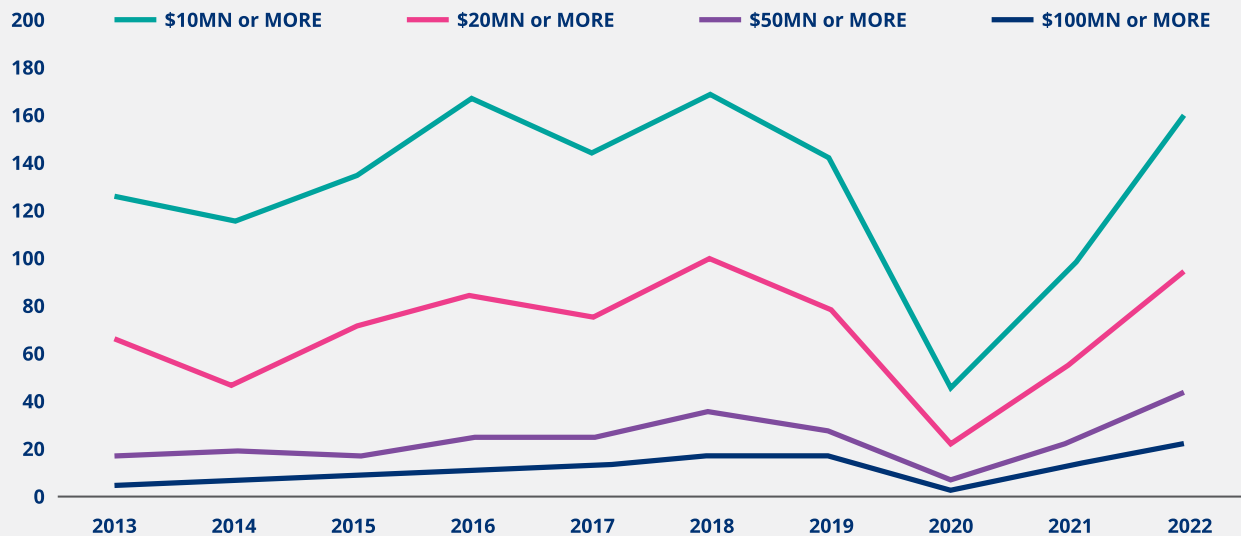
# \$100M+

is considered a mega nuclear verdict.

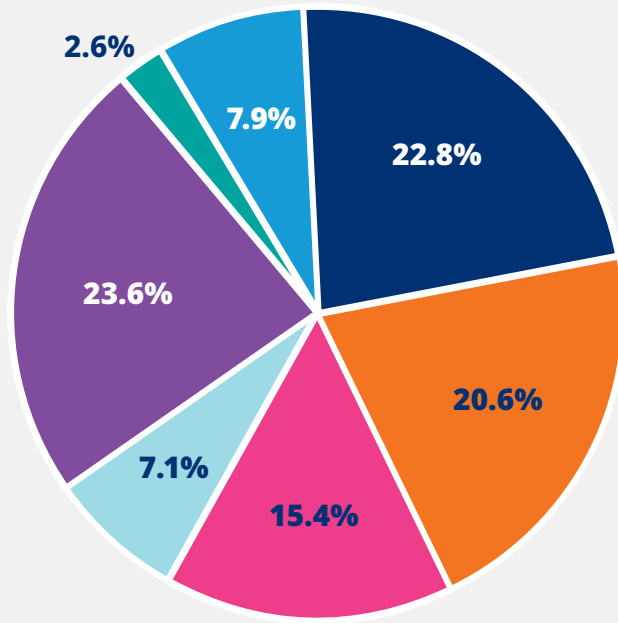
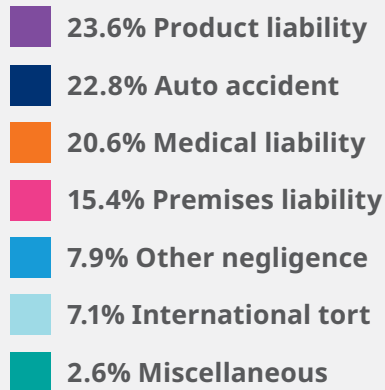
# \$1B+

is considered a thermonuclear verdict.

**Number of reported nuclear verdicts**  
2013-2022



### Nuclear Verdicts by Case Type 2010-2019



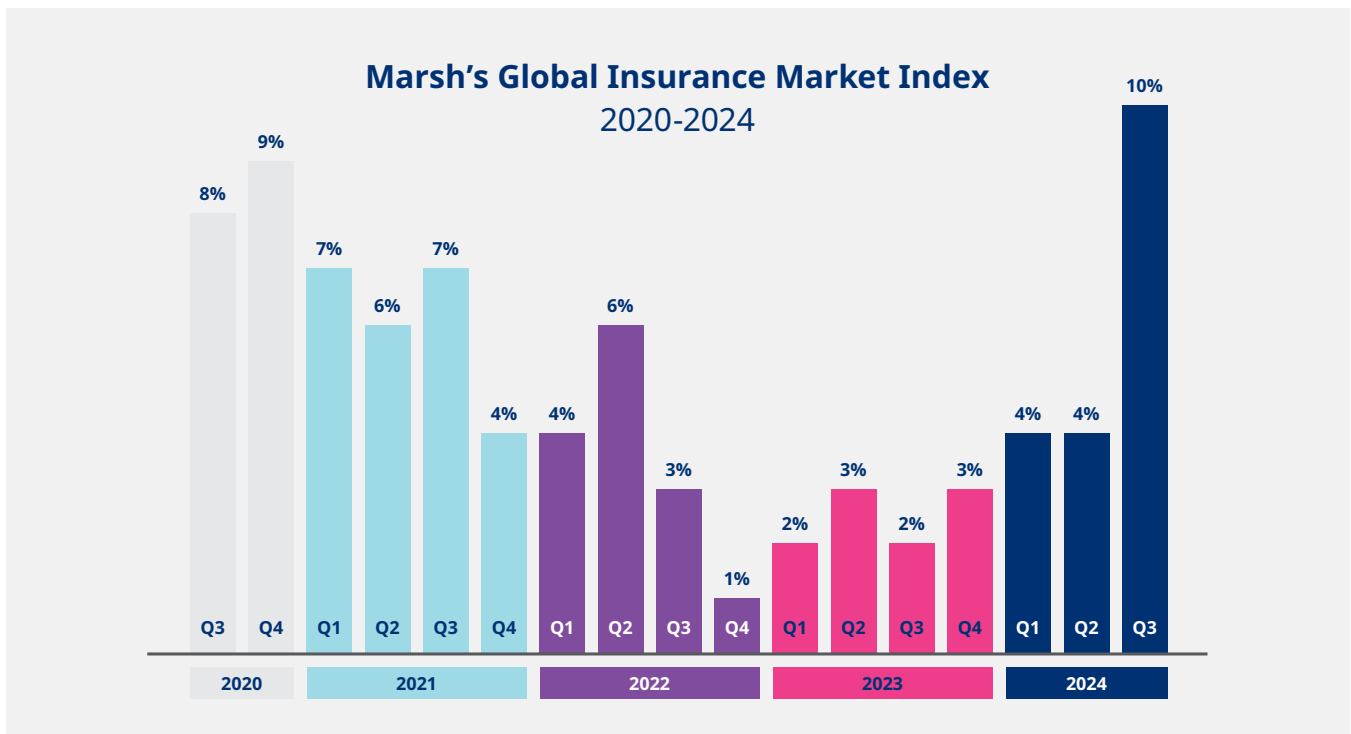
# 82%

**of nuclear verdicts are product liability, automobile accidents, medical liability, and premises liability.**

Considered by type of liability litigation, most nuclear verdicts in the ILR's database—more than 82%—comprise product liability, automobile accidents, medical liability, and premises liability. The distribution of large verdicts across just these segments suggests that businesses in nearly all industries may have exposure to high-stakes litigation. It is important to note the ILR dataset does not include nuclear verdicts involving employment, environmental, or intellectual property litigation—areas of significant exposure to different industries.

An emerging trend in liability risk is [technology-enabled claim instigation](#). This phenomenon was first observed in 2022 by insurance industry analysts who noticed a sharp increase in new litigation against a group of Florida insurance companies that subsequently became insolvent. Looking deeper, the analysts found a small number of opportunistic entities filing litigation nationally that targeted insurance companies and other businesses using a combination of litigation funding, search engine optimization, and litigation marketing. With artificial intelligence, tech-enabled claim instigation can be conducted efficiently against a large set of litigation targets. Tech-enabled claim instigation is presenting law firms with millions of opportunities to file lawsuits, which, at a minimum, is driving liability claim frequency.

A predictable result of greater frequency and severity in liability claims is a tightening of the casualty insurance marketplace. As liability insurers pay more and larger claims, policyholders may be seeing rates increase sharply and capacity for certain lines could shrink.



Casualty rates have spiked and may continue due to litigation funding. Marsh's Global Insurance Market Index shows average [U.S. casualty insurance rates](#) in Q3 of 2024 more than doubled from the prior quarter to 10%. That is the highest quarterly increase since 2020. Auto liability rates remain challenging due to large jury verdicts, ongoing supply chain issues, and rising repair costs. Marsh also found premises liability exposures, which underwriters historically saw as a lower risk, are now seeing large verdicts that could influence rates in the future.

In the umbrella and excess liability market rates tracked by the Marsh Global Insurance Market Index, risk-adjusted rates increased 21% compared to 10% in the prior quarter. Where there was no insurance program structure change, rates increased 20% and 5%, respectively.

Rates on umbrella programs with favorable loss experience and low-hazard exposure increased in the 10% to 15% range, while those with adverse loss development and exposure concerns typically saw program changes and rate increases of 30% and higher.



Insurers also are pulling back capacity and tightening policy terms and conditions in response to evolving market dynamics and heightened exposure. This trend reflects a broader shift in the insurance landscape, where underwriters are becoming more cautious and strategic in their approach to risk management. Many underwriters are looking to control losses by reducing their participation on excess layers. Whereas an insurer might have written a \$10 million layer a few years ago, today that same insurer might only be willing to offer \$5 million for the same risk. This increased reliance on a broader pool of insurers not only complicates the placement process but also demands thoughtful coordination of coverage terms and conditions among the various parties involved. In response to these challenges, organizations should consider various mitigation strategies to strengthen their risk management framework.

Any discussion of legal trends naturally must include the venues where lawsuits are filed. Across the U.S., numerous legal jurisdictions have earned a reputation as plaintiff-friendly. Not surprisingly, these venues tend to produce the largest verdicts and awards. The American Tort Reform Association for more than 20 years has ranked the most challenging states for defendants as ["Judicial Hellholes."](#)

### ATRA's 2023-2024 ranking lists nine jurisdictions as [Judicial Hellholes](#), with two tied at No. 1 for the first time:

**1. Georgia tied with Supreme Court of Pennsylvania and Philadelphia Court of Common Pleas**

2. Cook County, Illinois
3. California
4. New York City
5. South Carolina
6. Lansing, Michigan
7. Louisiana
8. St. Louis

On ATRA's Watch List are Kentucky, the Texas Court of Appeals for the Fifth District (Dallas), and New Jersey. According to ATRA, these jurisdictions require watching due to histories of abusive litigation or troubling developments. What all three on the Watch List share is a shift toward expanding liability for businesses.

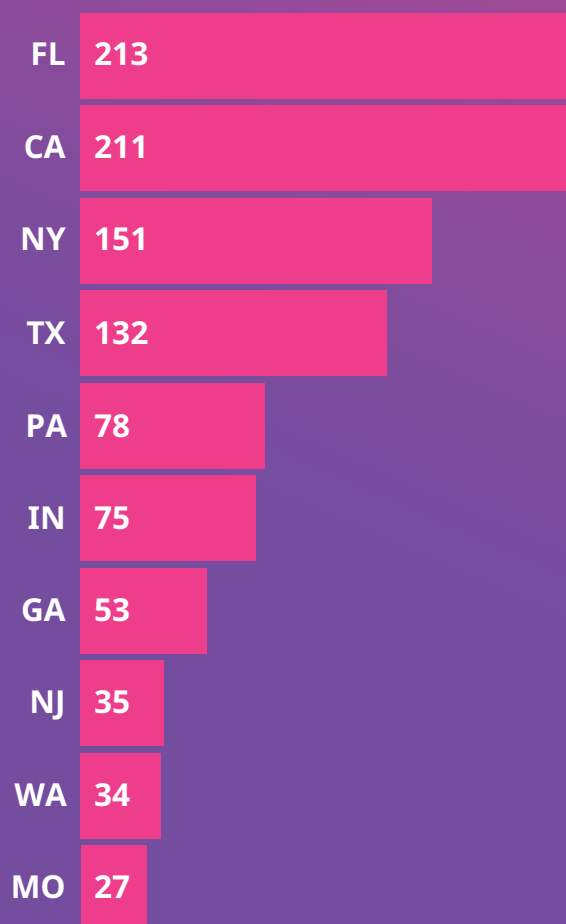
**Marsh & McLennan Agency LLC**

Plaintiff-friendly venues chart/map: states and jurisdictions with highest verdicts  
Source: US Chamber of Commerce Institute for Legal Reform

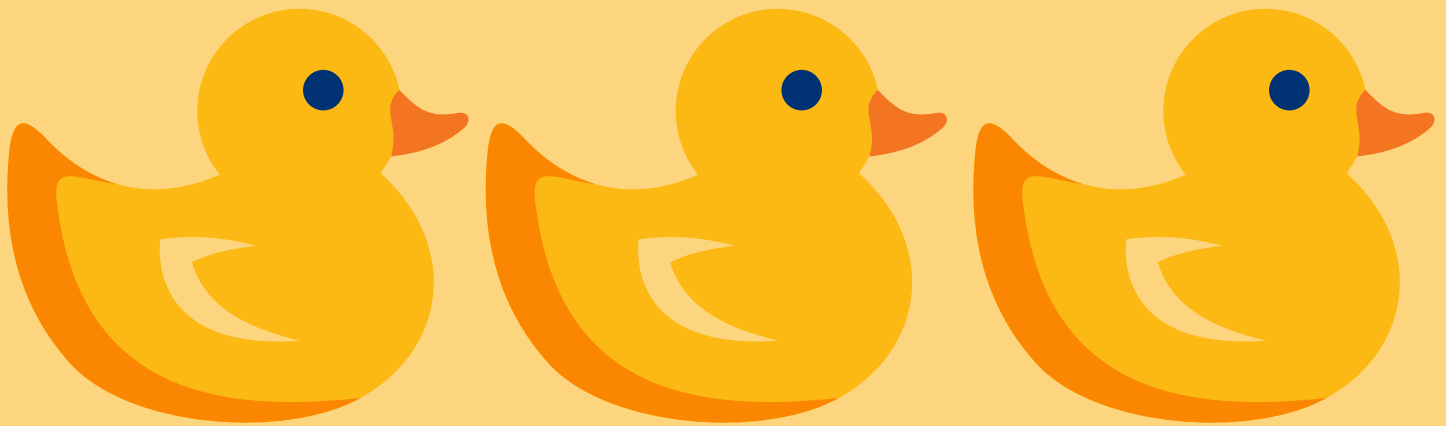
### Which venues are known for producing the most nuclear verdicts?

In the Institute for Legal Reform's 10-year study, the list has a lot of overlap with ATRA's list. Florida and California lead the nation in cumulative nuclear verdicts between 2010 and 2019, the ILR found. Each state had more than 210 verdicts exceeding \$10 million.

### Top 10 States by Cumulative Nuclear Verdicts 2010-2019







## Mitigation strategies

**Legal system abuse may seem too entrenched nationwide for businesses to halt and reverse the trend, but there is some good news.**

Businesses in every industry can take steps to mitigate their exposure to litigation, reducing the chances they will become the target of aggressive plaintiffs' attorneys. These steps are not exhaustive, by any means. Rather, businesses should consider them as starting points for productive discussions and data gathering.

**Get your mitigation ducks in a row. A prudent first step is to improve risk governance.**

To do that, businesses should bring together their operational, administrative, and financial leaders and answer questions such as these:

- What procedures does the organization have for identifying and assessing risks to its people, property, and customers, and informing its business decisions?
- Is your organization compliant with relevant health and safety regulations?
- Does your organization conduct ongoing training programs with employees?
- How does your organization assess and fulfill contractual obligations that might give rise to third-party liability?

## Another smart decision is to work with professional advisors, including legal counsel and risk advisors on risk tolerance and mitigation strategies.

These professionals can provide valuable objective viewpoints and offer insights from their experience serving other businesses.

### Actions that businesses can take with these advisors include:

- Review business contracts with legal advisors to achieve clarity on liability risk transferred to your organization and employees and ensure contractual requirements are met.
- Review liability insurance programs with risk and insurance advisors. Are current policies structured to reflect the organization's exposures, loss trends, and risk tolerance?

Use data analytics to identify patterns in the frequency and severity of claims impacting your organization. Consider leveraging the MMA analytics and claims team, and Marsh's Advisory Solutions to anticipate and mitigate risks.

Perform an assessment of your organization's risk management and workforce strategies, and benchmark using industry-based data. Marsh McLennan Agency's Risk Services team can help with these as well as advising on regulatory compliance education and best practices and assisting with your business continuity planning.

- Update insurance limits to align with current exposures. Some businesses make a habit of buying the same amount of coverage year after year, while others buy less to save money. Exposures can and do change, and legal system abuse continues to inflate the cost of liability claims.

## Engage with external stakeholders.

If they have not already done so, businesses should strive to build relationships with legislators and community leaders. This can take the form of a program to be a good corporate citizen that is involved in community affairs. Philanthropy, volunteerism, and other activities are ways that businesses can show support for their communities.



# Ensure your future is limitless.



Safeguard your organization from vulnerabilities that can arise from legal challenges and partner with us to develop a strategic plan tailored to your business' needs.

Reach out to a specialist today to learn how we can help you navigate these complexities and protect your interests.

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